

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re: California Power Exchange Corporation,)	No. 01-70031
)	
Petitioner.)	

**RESPONSE OF THE
FEDERAL ENERGY REGULATORY COMMISSION
IN OPPOSITION TO CALPX PETITION**

Pursuant to F.R.A.P. 21(b), Circuit Rule 21-4, and this Court's January 5, 2001 Order, the Federal Energy Regulatory Commission ("FERC" or "Commission") opposes the so-called "Emergency Motion and Petition for Stay," ("Pet.") filed by the California Power Exchange Corporation ("CalPX"), seeking to stay three aspects of *San Diego Gas & Electric Co.*, 93 FERC ¶ 61,294 (2000)("December 15 Order")(Appendix C to CalPX's Petition). Pet. 2-5.¹ The December 15 Order is currently pending rehearing, and thus is not a final agency order. CalPX seeks to avoid the unavailability of judicial relief of a non-final FERC order by invoking the All Writs Act, 28 U.S.C. § 1651.

CalPX fails to show, however, that this is a truly extraordinary case justifying invocation of jurisdiction for interlocutory review of a non-final agency action. Further, CalPX does not meet its heavy burden of showing a clear and indisputable right to

¹CalPX's motion is 30 pages long. To respond fully to that motion, FERC moves, pursuant to F.R.A.P. and Circuit Rule 27, for leave to file this response of 25 pages.

issuance of its requested extraordinary relief. Finally, CalPX does not meet the criteria for issuance of a stay. Accordingly, the petition should be denied.

On January 8, 2001, the Commission issued an order clarifying its December 15 Order to the extent that its "determination to terminate [CalPX's] existing whole rate schedule was not intended to preclude the PX [through CTS] from engaging in bilateral forward contracting." The Commission advised CalPX that it "is free to revise its CTS tariffs to remove the spot market components of its existing rate schedules," and to file the revised tariffs so as to allow CTS to provide forward energy services. (Attachment 1 hereto). This moots CalPX's second requested stay action. Pet. 29-30.

FACTUAL BACKGROUND

Despite recognizing from inception that the buy/sell requirement imposed by California's restructuring law offered only a transitory business and that its long-term survival depends on its ability to compete successfully with other market makers, CalPX, now that the anticipated moment is here, asks for extraordinary relief to extend the preferential treatment that it enjoys under the existing regime. Extending that preferential treatment -- CalPX's monopoly in the buying and selling of the IOUs' own generation and, in effect, a guaranteed recovery of costs -- would come at a steep price: continuation of the constraints that led to the present dysfunctions in the California electricity markets. CalPX's proposed relief would benefit only its narrow self-interest

in maintaining an accustomed way of doing business, not the broader public interest factors that the FERC must and did consider in the December 15 Order. As such, CalPX's petition does not warrant this Court's exercise of its extraordinary power.

California's restructuring law, as implemented by the California Public Utilities Commission ("CPUC"), requires investor-owned utilities ("IOUs") to sell all their generation to, and to buy all their electricity needs from, CalPX ("buy/sell requirement"). The law, as implemented, also set a frozen rate for retail customers.² This scheme allowed IOUs to recover their stranded costs during the transition to fully competitive markets. The CTC and buy/sell requirement are intended to operate either until an IOU's stranded costs were paid or until March 31, 2002, whichever is sooner.

CalPX described its purpose in this scheme as "establishing a transparent market price as a benchmark for applying the" CTC. *See* October 17, 1997 Letter from CalPX to FERC at 1 (Attachment 2 hereto). This was done through a single price auction under which the bid for the last electricity actually purchased set the price for all bidders. During the buyer's market that existed until recently in California's electricity markets, market clearing prices were lower than retail rates, thus allowing a fast write-

²The difference between the frozen rate and the IOUs' cost of buying power is the Competition Transition Charge or CTC, and is used to write-off IOUs' stranded costs.

off of IOUs' stranded costs.³ During the past few months a seller's market has existed, with the market clearing prices higher than retail rates. The resulting problems highlighted the inadequacies of the buy/sell requirement under CalPX's single price auction. *See* November 1 Order at 24 (concluding that the buy/sell requirement "is a significant factor contributing to rates that are unjust and unreasonable.").

In addition to its transition role, CalPX has a second purpose: "to be a catalyst in the transformation of the industry into one characterized by robust competition." October 17 Letter at p. 2 of 20. CalPX saw one "special feature of [its] second role" as its exercise of "the power to detect attempts to collect extra-competitive profits and the ability to deter such behavior through modification of its trading rules." *Id.* at 5. Also tied to this role was "the task of innovation," which "imposes significant developmental costs and high risks on the organization." *Id.*; *see also id.* at 11 ("bulk of the dollars in [developmental] budget are directed toward . . . yet to be determined new products"). Such development was needed, in part, because CalPX was "in the anomalous situation of constructing a very large capacity system with the prospect that it may face a rapidly dwindling customer base." *Id.* at 5. In short, CalPX recognized the risk that unless it

³ To be sure, the frozen rate was set at 10% below then-existing retail rates, thus benefitting consumers. Nonetheless, favorable conditions kept the price for electricity lower than the frozen rates, which resulted in "the IOUs [being] able to write off substantial amounts of stranded costs." November 1 Order at 23 (Appendix A to Petition).

could produce new products rapidly, it faced the prospect of the State-imposed buy/sell requirement ending before new replacement business was developed.

CalPX's FERC Electric Tariff reflects its differing purposes by establishing two customer bases. First, CalPX "recognize[d] that it enjoys a guaranteed, if transitory, customer base provided by statutory fiat." *Id.* at 14. The tariff definition of this group (Full Requirements Customers) expressly acknowledges its transitory nature: it consists of the IOUs "who are required to bid all their generation into the PX and must purchase all of the electric energy required to serve their utility service retail customers through the PX *during the transition period, projected to be four years.*"⁴(Emphasis added). One part of the rate charge to this group is called an "Initial Charge," which is designed "to cover the PX's startup, development, and initial working capital costs." PX Tariff Sheet Nos. 47-49. The second part of this group's rate is a volumetric charge, which covers CalPX's operating expenses, including debt service (CalPX has no equity), attributable to the group. *See generally id.* at 50-52 (describing volumetric charge).

A second group of customers, defined as "all voluntary PX Participants," *id.* at 49, represents "the market customers of the PX's entrepreneurial products," that is, the new business on which CalPX's long-term hopes must rest. October 17 Letter at 14.

⁴ See PX Tariff Schedule 1, PX Rate Schedule, Original Sheet Nos. 48-49 "Initial Charge." (Attachment 3 hereto)("PX Tariff").

These customers pay only a volumetric charge; they are not required to pay for any portion of CalPX's startup, development or initial charges. PX Tariff 49-50.⁵ Of course, other PX's competing for these same market customers, and who did not enjoy CalPX's "guaranteed, if transitory, customer base," October 17 Letter at 14, must recover their startup and development costs plus operating expenses, if at all, in their market prices.

Thus, CalPX had the advantage of the mandatory buy/sell requirement to assure recovery of its startup, initial working capital, and development costs (the bulk of the latter costs being directed to "support the development of yet to be determined new products") through the IOUs' Initial Charge, which was ultimately paid by the millions of California consumers served by the IOUs. This, in turn, reduced the costs that would have to be recovered from the new, voluntary customers of CalPX. The Initial Charge recovery was substantial, amounting in total to \$100,876,986, and was accelerated to less than three years (April 1998 to January 2001), so as to allow full recovery before the transition period contemplated by the Tariff ended. PX Tariff 49. The last payment due date was January 2, 2001, *id.*, just two days before CalPX filed the instant petition. Going forward, full requirements customers appear to be liable only for volumetric charges under the Tariff.

⁵ Partial Requirements customers can alternatively pay a Subscription Charge and nominate a set amount over one year or one month. The Subscription Charge, practically speaking, is the Volumetric Charge pro rated over the nomination period. *Id.* at 50.

This means that CalPX has recovered all startup costs related to both its stated purposes: implementing the transition and being a catalyst for new market products. Having recouped all those costs, CalPX's only remaining costs are ongoing operating expenses related to service actually provided, which are recovered through CalPX's volumetric charge. This setup gives CalPX flexibility. *See* CalPX December 18, 2000 letter (Attachment 4 hereto)("CalPX, of course, reserves its existing rights under Section 205 of the Federal Power Act to restructure its rates and charges as circumstances may warrant."). This would explain the confidence of Mr. Sladoje, CEO of CalPX, in testimony leading to the December 15 Order, who stated that "if the mandatory buy/sell requirement is prematurely terminated, as indicated in your order, then we will accept that decision and we will move on, and we will adjust accordingly." FERC November 9, 2000 Technical Conference, Tr. 243 (Attachment 5 hereto).

Ignoring this history, CalPX now contends that "FERC's action is confiscatory because it eliminates the ability of CalPX, an institution created at a cost of \$100 million, to meet its expenses, carry out its functions, and remain in business." Pet. 15. To the contrary, CalPX has always expected and planned for this transition. Just recently, CalPX filed tariff amendments that would allow CTS to service new markets in New England and the Pacific Northwest. In the November 22, 2000 Order accepting that filing (Attachment 6 hereto), the Commission advised CALPX to propose other

tariff modifications so as "to provide new services and terms to support further development of the markets it administers." *Id.* at 7.

The December 15 Order, at 76 ¶ A, does not require termination of the existing CalPX tariffs until April 30, 2001. As the November 22 and January 8 FERC Orders make clear, CalPX is free either to modify existing tariffs or to propose new ones for new, competitive services, including CTS forward energy services, before that termination date. This timing allows an orderly transition. It does not show an immediate need for extraordinary court action.

ARGUMENT

I. CalPX Has Not Shown The Truly Extraordinary Circumstances Necessary To Warrant Court Intervention In A Non-Final Agency Action

A. The All Writs Act Does Not Confer Jurisdiction

Contrary to CalPX's contention,⁶ the All Writs Act does not provide a separate source of jurisdiction. *See, e.g., Lights of America, Inc. v. U.S. Dist.Ct*, 130 F.3d 1369, 1370 (9th Cir. 1997) ("the Supreme Court has long held that the All Writs Act is not itself a source of jurisdiction."). Rather, the Act may be invoked by a "court only in aid of jurisdiction which it already has." *Stafford v. Superior Ct.*, 272 F.2d 407, 409 (9th Cir. 1959). No court yet has jurisdiction over the December 15 Order under the statutory review process of the Federal Power Act ("FPA"), 16 U.S.C. § 825 *et seq.*, as CalPX concedes. Pet. 19 ("December 15 Order is not yet a 'final order' from which a petition for review by this Court would lie under Section 313 of the FPA").

Despite this concession, CalPX gives only a perfunctory nod as to why this Court should nonetheless take jurisdiction. *See id.* (as FPA § 313 allows CalPX to file a petition in this Circuit, "the requested stay order is plainly 'in aid of' the appellate jurisdiction [of] this Court"). This obviously wrong assertion demonstrates a lack of understanding of the "in aid of" language. Even if it is assumed (contrary to our view)

⁶ *See, e.g.,* Pet.18 (section heading "Jurisdiction Lies Under the All Writs Act").

that CalPX will "not survive that long," *id.*, it or any party, if adversely affected by the December 15 Order, may file for review in this Circuit or the D.C. Circuit. FPA § 313(b).⁷ Thus, if, as we expect, the petition is denied, this Court or the D.C. Circuit will still retain jurisdiction to hear properly filed petitions for review of the December 15 Order. In short, granting the petition will not be "in aid of" appellate jurisdiction.

B. CalPX Has Not Met The Requirements To Assert Jurisdiction Now

As this Court has stated, "[t]he jurisdictional basis for interlocutory review of any nonfinal [agency] action is our inherent power of mandamus *to preserve prospective jurisdiction*." *Public Ut. Comm'r of Oregon v. BPA*, 767 F.2d 622, 630 (9th Cir. 1985)(emphasis added).⁸ As the *BPA* court noted, "[t]he circumstances that will justify our interference with nonfinal agency action must be truly extraordinary for this Court's supervisory province as to agencies is not as direct as our supervisory authority over trial courts." *Id.* (citations omitted). The court indicated that a petitioner in such circumstances must "demonstrate . . . irreparable injury that is not correctable

⁷ For example, a bankrupt entity is currently a petitioner seeking review of FERC orders in *The Power Company of America, LP v. FERC*, No 99-1263 *et al.* (D.C.Cir.).

⁸ The fact that CalPX styles its petition as a request for stay does not obviate the need for the Court to determine whether it has jurisdiction to issue a stay of a non-final agency action under the All Writs Act. As *BPA* makes clear, the analytical framework for this threshold question is the one used in deciding whether a mandamus of a non-final agency action properly lies. *See also* this Court's January 5 Order (referring to "petition for an extraordinary writ of mandamus"). CalPX fails to address this threshold question.

on review of final [agency] action." *Id. Accord PUC of California v. FERC*, 814 F.2d 560, 562 (9th Cir. 1987). CalPX has not made the requisite injury showing.

In addition to the irreparable injury requirement, before a court can insert itself in the middle of an ongoing proceeding under the All Writs Act, the moving party "has the burden of showing that its right to issuance of the writ is clear and indisputable." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988).⁹ (internal quotation marks and citations omitted). To satisfy that burden in cases of non-final agency actions, such as presented here, requires a showing of "an outright violation of a clear statutory provision . . . or violation of basic rights established by a *structural* flaw, and not requiring *in any way* a consideration of the interrelated aspects of the merits - which can only be done appropriately on review of a final order." *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1180 (D.C.Cir. 1979)(Leventhal, J., concurring)(emphasis in original) *cert. denied* 447 U.S. 921 (1980); *accord Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 79 (D.C.Cir. 1984); both cases cited with approval, *BPA*, 767 F.2d at 629-30.¹⁰

⁹ The D.C. Circuit relied on *Gulfstream* in denying a similar emergency petition related to the December 15 Order. *In re: Southern California Edison Co.*, No. 00-1543 (D.C.Cir.) "Order" (January 5, 2001)(unpublished)(Attachment 7 hereto).

¹⁰ This test may be likened to the test for determining whether an interlocutory court ruling can be reviewed under the "collateral order" doctrine. "For an interlocutory (continued...)"

CalPX failed to recognize the necessity to satisfy these criteria, and thus failed to show its clear and indisputable right to the requested relief. Nonetheless, reviewing CalPX's proposed stay requests, Pet. 29-30, shows that granting the relief would indisputably require the Court to consider the merits of the December 15 Order, as the requests all rest on challenges to substantive rulings in the December 15 Order. The necessity to become entangled in the merits of substantive rulings is further emphasized in the summary, Pet. 2-5, where CalPX asserts, for example, that: a "decision was made without any finding," at 2, and "jettison[ed] the public interest benefits", at 3; a second challenged FERC action "fails to contribute to alleviation of the California energy crisis," at 4; and, the third challenged action will lead to "migration of business out of the CalPX markets," at 5.

CalPX's proposal thus improperly draws this Court into consideration of the merits on mixed questions of fact, law, and policy. As such, it must be rejected as presenting issues that may not be properly considered prior to final agency action. Prudential reasons counsel that court consideration of these types of mixed fact/law questions must await review after final agency action, as suggested by this discussion

¹⁰(...continued)

order to be appealable as a 'collateral order,' it must satisfy three requirements: It must be conclusive, resolve an important question separate from the merits, and be effectively unreviewable on appeal from a final judgment." *Wharton v. Calderon*, 127 F.3d 1201, 1203 (9th Cir. 1997)(citations omitted).

of when interlocutory appeal is properly heard. "First, the challenge . . . involves no disputed factual issues that demand the creation of a better administrative record. Second, the issue involved . . . is a pure question of law. The Commission can bring no particular expertise to bear on its determination. Consideration of this question of first impression will not necessarily permit future piecemeal attacks on administrative processes." *Ass'n of Nat'l Advertisers*, 627 F.2d at 1157 (footnote omitted). CalPX's petition disputes the treatment of factual issues within FERC's expertise as applied to policy decisions delegated by the FPA to the Commission. A favorable ruling here would encourage piecemeal litigation in future cases as individual parties would likely seek the same type of relief for their parochial issues. Consequently, the petition should not be considered as a worthy candidate for court intervention at this time.

C. CalPX Has Not Shown Either Irreparable Or Uncorrectable Harm

As noted, court intervention in non-final agency proceedings cannot be justified absent a showing of "irreparable injury, that is damage or prejudice not correctable on review of the final agency action." *Clark v. Busey*, 959 F.2d 808, 813 (9th Cir. 1992)(citations omitted); *see also Northern States Power Co. v. U.S. DOE*, 128 F.3d 754, 759 (D.C.Cir. 1997)(ruling relief should not be granted if movants "are presented with another potentially adequate remedy"). CalPX's showing does not come close to what is required. Rather, it alleges harm to third parties, not to CalPX; it offers self-

imposed injury and competition from other market participants as cognizable harm; and, it fails to show that the alleged injury could not be corrected.

An essential basis for extraordinary relief is irreparable harm due to the inadequacy of legal remedies. *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citations omitted); *accord, e.g., Colorado River Indian Tribe v. Town of Parker*, 776 F.2d 846, 851 (9th Cir. 1985); *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984); *Los Angeles Memorial Coliseum Com'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980). The harm must be both "certain and great; it must be actual and not theoretical." *Wisconsin Gas*, 758 F.2d at 674. CalPX's harm allegations are speculative, and thus do not satisfy its burden on this ground.¹¹

CalPX's purported irreparable injury showing does not present any facts to show how or when the alleged harm might occur, but is largely bombastic attacks on the Order. *See* Pet. 14-15 ("termination was totally unnecessary to address the issue of mandatory sales into CalPX markets, and no rationale was articulated"; "is contrary to the express requirements" of the FPA; "is blatantly discriminatory"). While FERC

¹¹ CalPX, apparently concerned that its showing fails under *Wisconsin Gas*, cites *American Public Gas Ass'n v. FPC*, 543 F.2d 356, 357-59 (D.C.Cir. 1976), *cert. dismissed*, 429 U.S.1067 (1977), as support for a limited injunction in the context of non-final agency action. Pet. 28-29. The value of reliance on that case as proper support for a stay in these circumstances was negated by *Reynolds Metal Co. v. FERC*, 777 F.2d 760, 763 (D.C.Cir.1985): "If the intervening cases left any doubt that [*American Gas*] has been limited to its particular facts, the present opinion should eliminate it."

vigorously disagrees with each contention, the key point for the present discussion is that none of them show this Court whether and how any harm will occur to CalPX.

In fact, CalPX's harm claims are largely claims *about others* (none of whom is present here). CalPX asserts that eliminating the buy/sell requirement "reduces the depth, liquidity and overall value of the markets *for other participants*." Pet. 16 (emphasis added). As to the "unique price limits, reporting and refund requirements" imposed by the \$150 breakpoint, Pet. 17, those are borne by sellers whose bids are at or above \$150 (none of whom is present here), not by CalPX. At a minimum, CalPX's approach gives it the burden of showing that claimed third party effects will directly harm it and the extent and timing of such harm.¹² *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)(when standing rests on choices by third parties, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability").

¹² CalPX makes the unsupported assertion that the \$150/MW breakpoint "will, without question, drive discretionary transactions away from CalPX." Pet. 17. That assertion is subject, however to serious questioning. First, and assuming *arguendo* sellers are troubled by the reporting requirements, no showing has been made that sellers would trade the advantages of selling on the largest exchange for the much smaller exchanges just to avoid reporting requirements. Likewise, sellers considering bids near \$150 could choose to bid under \$150, if they perceive regulatory costs as too high. Second, prior to the past few months, the average price of electricity in California was \$40/MW, so it is unclear the extent to which the \$150 breakpoint will actually apply. In other words, it can as easily be assumed that CalPX will suffer inconsequential harm.

CalPX's only attempt to claim harm *to itself* contends that the loss of IOU sales (asserted to constitute half the California market, but an unknown amount of CalPX's market) "drastically reduces contributions to CalPX's operating costs." Pet. 16. But, as CalPX's December 18 letter (Attachment 4) makes clear, CalPX has reserved its rights to restructure its rates to fit new circumstances. Thus, its own tariff offers an alternative avenue of possible relief. In any event, CalPX's conclusory statement of claimed drastic reduction does not "provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future," as required to demonstrate that "the harm will *in fact* occur." *Wisconsin Gas*, 758 F.2d at 674 (emphasis in original).¹³

Equally troubling is CalPX's failure to explain why it cannot follow the Commission's invitation "to reconstitute itself as an independent exchange with no regulatory mandated products and offer the services needed by market participants." December 15 Order at 36 n. 46. As noted earlier, CalPX's second purpose was to develop innovative, new services. A considerable portion of the \$100 million

¹³ Mr. Kane's Affidavit (Appendix F) does not attempt to show irreparable harm. See Pet. 18 (using Kane affidavit as support for not meeting deadline). In any event, the affidavit merely describes "some of the difficulties" claimed. ¶ 3. Difficulties in implementing regulatory requirements do not show irreparable harm. *E.g.*, *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S.1, 24 (1974)("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

already collected from the IOUs was designated for that purpose. Yet, rather than embrace this new opportunity, CalPX whines that the Order "gave no assurance that FERC would approve a new rate schedule or, if so, when such approval would be forthcoming." Pet. 13 n. 19. Apparently, CalPX overlooked FERC's statutory obligation to accept all rate schedules filed by public utilities unless a proposed rate schedule is unjust, unreasonable or otherwise unlawful. FPA § 205(e).

On the timing concern, CalPX filed tariff amendments on October 10, 2000, to allow CTS to serve new markets. The Commission accepted the tariff amendments for filing in a November 22, 2000 Order (Attachment 5 hereto), to become effective December 10, 2000, that is, sixty days after they were filed. In view of this prompt response to a new CTS tariff, CalPX professed concern about uncertainty and delay (Pet. 13 n. 19) must be seen as a litigation ploy, not a realistic possibility.

In sum, CalPX has failed to show that it has suffered any irreparable injury as a result of the December 15 Order. Consequently, it fails to meet this criterion, whether as part of the threshold test for deciding whether this Court should exert jurisdiction over a non-final agency action or as part of the traditional test for determining whether a stay should issue.

D. CalPX Is Unlikely To Prevail On the Merits

As demonstrated above, CalPX fails to show it will suffer any irreparable injury as a result of the December 15 Order. We next show that CalPX is unlikely to prevail on the merits. Under the test established by this Circuit, a weak showing on one of these factors coupled with a strong showing on the other might be sufficient to justify a stay. *Native Village of Quinhagak v. United States*, 35 F.3d 388, 392 (9th Cir. 1998) (required degree of irreparable harm increases as the probability of success decreases); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516 (9th Cir. 1993)(same). No cases stand for the proposition, however, that a weak or nonexistent showing on both factors would justify issuance of a stay.

1. Terminating CalPX's Tariff Was Necessary To Fulfill FERC's Duties

The Commission does not disagree with CalPX's characterization that terminating the CalPX tariff and CTS rate schedule was "unprecedented," Pet. 22, but, then again, the whole California situation has been unprecedented. California was the first state to implement a retail restructuring plan, and its method of implementation – with the buy/sell requirement and single price auction – was unique. In these circumstances, almost any action taken by the Commission would be unprecedented,

but that does not mean, as CalPX implies, that the Commission's action was unlawful. To the contrary, the action taken followed the procedure established by FPA § 206.

FPA § 206 provides, in essence, that the Commission can on its own motion investigate existing rates, and, if it finds those existing rates unlawful, set new just and reasonable rates. Once the Commission became aware of the serious economic impact that the existing wholesale market structure was having on California, it took expeditious action. The Commission not only responded to numerous formal and informal complaints, comments, and inquiries, but also it held hearings both here and in California and ordered its Staff to investigate the issues. *See generally* November 1 Order at 10-16 and December 15 Order at 6-22 (describing events).

Based on evaluation of all this information, the Commission concluded that it was no longer just and reasonable to continue reliance on the buy/sell requirement for virtually all the IOUs' needs because that created a dysfunctional wholesale spot market with considerable volatility. "[W]e conclude that the current PX buy/sell requirement produces an unworkable spot energy exchange that does not operate as a market. Rather, the mandatory participation requirement . . . is producing rates that are not just and reasonable during certain periods." December 15 Order 35. Thus, the Commission's own evaluation met the first requirement of FPA § 206, to show the

existing tariff was operating in a way that produced unjust and unreasonable rates at certain times and under certain conditions.

To that end, and recognizing CPUC's unwillingness to relinquish reliance on the buy/sell requirement, the Commission "conclude[d] that it is necessary to take the unusual step of terminating the PX's wholesale tariffs which . . . *enable it to continue to operate as a mandatory exchange.*" *Id.* at 36 (emphasis added). Because the initial § 206 finding was that operation of the mandatory exchange itself could cause unjust and unreasonable rates, the Commission properly tailored its relief to eliminate that problem. This could be done only by terminating CalPX's wholesale tariffs: "it is only by eliminating the PX's exclusive mandatory exchange that we can assure that prices in California wholesale markets will be just and reasonable." *Id.* Thus, the relief was contoured to the harm that had been identified, as required by FPA § 206.

With regard to the forward market issue related to CTS, the Commission's January 8 Order (Attachment 1) makes clear that with some modification to existing tariffs, CTS can proceed to fashion a forward market tariff. This moots CalPX's second relief request. Pet. 29-30.

As to CalPX's contention that the termination "is unconstitutional because it violates CalPX's fundamental right not to have its property taken without due process and just compensation," Pet. 23, little needs be said. The case law is to the opposite:

"a company that is unable to survive without charging exploitative rates has no entitlement to such rates." *Jersey Central Light & Power Co. v. FERC*, 810 F.2d 1168, 1180-81 (D.C.Cir. 1987)(*en banc*)(citations omitted). As CalPX's existing tariff operated in a manner that led to exploitative unjust and unreasonable rates at certain times and under certain conditions, it has no constitutional right to retain that tariff.¹⁴ In addition, CalPX has already recovered its full \$100 million startup costs, and has the opportunity to recover ongoing operating expenses through its tariff. Thus, this case does not present a takings issue.

2. The \$150 Breakpoint Was Rationally Applied Only To CalPX Markets

CalPX argues that applying the \$150 breakpoint to it but "not on other similarly situated trading venues, discriminates unreasonably against the CalPX markets in violation of Sections 205(b) and 206(a)." Pet. 24. CalPX overlooks fundamental points that are fatal to its charges. The Commission's investigation responded to complaints addressed only to CalPX and Cal ISO markets, and not to any other trading venues. Further, CalPX is the only mandatory power exchange. Not only does this fact

¹⁴ The cost of continuing CalPX's existing tariff, and thus the buy/sell requirement, is substantial. Southern California Edison in its petition for emergency relief, *supra* n.9, stated that selling its own generation under the CalPX tariff during May-November 2000 led to a claimed \$1.8 billion undercollection (*i.e.*, the difference between what Edison paid to purchase its own electricity back from CalPX and what it would have charged if it supplied itself directly), or a monthly average of over \$250 million. Scilacci Declaration ¶ 5 (Attachment 8 hereto). Eliminating the buy/sell requirement eliminates that cost.

distinguish it from other PX's, but also it was the mandatory nature of the buy/sell requirement going through the CalPX that the Commission found "is producing rates that are not just and reasonable during certain periods." December 15 Order 35.

Thus, sound distinctions show why the Commission focused on the CalPX markets. Moreover, as an agency's decision to prosecute or not to prosecute a case is subject to its absolute discretion, CalPX's charges, which are nothing more than an allegation that the Commission either should have looked at other markets or should have not looked at the CalPX markets, cannot be sustained. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *accord California v. United States*, 104 F.3d 1086, 1094 (9th Cir. 1997).

In sum, CalPX is unlikely to prevail on the merits of its legal claims.

E. The Public Will Be Hurt By Grant of CalPX's Stay

Given the weakness of both CalPX's irreparable injury and its likelihood of prevailing claims, it is highly unlikely that the last two criteria of the stay test – effects on third parties and where lies the public interest – even if they were in CalPX's favor, could outweigh those deficiencies. But, in fact, both factors weigh strongly for denying the stay. If granted, the stay would obviate two cornerstones of FERC's protections against unjust and unreasonable rates in the California electricity markets: elimination of the buy/sell requirement and adoption of the \$150 breakpoint. As noted earlier, the

average additional monthly cost to SoCalEd's customers alone from continuation of the buy/sell requirement is \$250 million, if the conditions prevalent in May-November persist. That number increases when the other IOUs are factored into the equation.

The \$150 breakpoint also provides substantial consumer benefits through its reporting requirements, which are designed to allow monitoring of bids at or above \$150 with potential refunds if the Commission determines that market power is being exercised or that a rate is otherwise unjust and unreasonable. December 15 Order at 5. Eliminating the breakpoint will negate those safeguards for protecting the public.

CalPX's public interest claims, distilled, seek solely to protect its own self-interest. *See* Pet. 26 (claiming need for stay so CalPX's "infrastructure investment will [not] be lost"). It also argues that the Commission's order "has the effect of intruding upon the design of the California retail electricity market which is subject to exclusive regulation by the CPUC." *Id.* The December 15 Order addressed only changes to the wholesale market, *see, e.g.*, December 15 Order at 35 ("eliminating any mandated reliance on the spot market represents the single most important aspect of *wholesale market reform*")(emphasis added), and did not intrude on State retail matters. Contrary to CalPX's argument quoted above, the Commission was concerned that its remedies would be frustrated by the CPUC's failure to take appropriate action on matters subject to CPUC jurisdiction. *See id.* ("Unless this restriction is removed by the [CPUC], the

wholesale markets under our jurisdiction will continue to produce prices which are unjust and unreasonable during certain periods."). Clearly, the FERC was mindful of the limits of its jurisdiction, and did not overstep those bounds.

In sum, all the stay criteria tip decidedly against issuance of CalPX's requested stay.

CONCLUSION

For the reasons stated, CalPX's emergency motion should be denied.

Respectfully submitted,

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